IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 133—Miscellaneous

EARL R. DEEN, *Petitioner*

vs.

HONORABLE J. E. HICKMAN, ET AL, *Respondents*

REPLY OF RESPONDENT GULF, COLORADO AND SANTA FE RAILWAY COMPANY TO PETITION FOR MANDAMUS

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Gulf, Colorado and Santa Fe Railway Company, respondent herein, prays that Earl R. Deen's motion for leave to file petition for a writ of mandamus and for a writ of mandamus be dismissed or, in the alternative, that it be denied. Respondent denies jurisdiction and denies error, and in support of these contentions presents the following:

STATEMENT OF THE CASE

The facts of this case and the decisions of the various courts are all reported and set out the nature of the case and the nature of the decisions of the re-

spective courts, and no matter how petitioner or respondent characterizes those holdings, they speak for themselves.

The first opinion is that of the Eastland Court of Civil Appeals (275 S.W. 2d 529), which held that there was no evidence to support the jury's finding that there was negligence on the part of the railroad proximately contributing to the injury in failing to furnish proper tools. The Supreme Court of Texas refused Deen's application for writ of error. Deen applied for certiorari, and the Supreme Court of the United States (353 U.S. 925, 1 L.Ed. 2d 721, 77 S. Ct. 678) overruled the Court of Civil Appeals finding of "no evidence" in a Per Curiam opinion and remanded the case to the Court of Civil Appeals for further proceedings. After that remand, the Court of Civil Appeals at Eastland (306 S.W. 2d 171) refused to consider the Santa Fe's contention that the jury's finding was against the overwhelming weight and preponderance of the evidence and was therefore plainly wrong, but did require a remittitur of $5,500.00, which Deen submitted to; then the Santa Fe (and Deen, also) applied to the Supreme Court of Texas, which granted a writ of error. That court (312 S.W. 2d 933), remanded the case to the Court of Civil Appeals, holding in effect that, while the decision of the Supreme Court of the United States overruling the Court of Civil Appeals finding of "no evidence" was conclusive and decisive on that point and binding upon the Texas Supreme Court, the Court of Civil Appeals, and the trial court, the decision of the Supreme Court of the United States did not pass upon

the issue of "overwhelming weight and preponderance of the evidence," and the mandate of the Supreme Court of the United States did not preclude the Court of Civil Appeals from considering such assignments or from reversing and remanding the case to the trial court for a completely new trial before a different jury. The petition for mandamus is directed not at the Court of Civil Appeals, to whom the mandate went, but to the Supreme Court of Texas.

In the petition for mandamus and in the petition for certiorari, which Deen has filed simultaneously, there are repeated references to the question of the costs in the Supreme Court of the United States, which were taxed against the Santa Fe. Contrary to statement of Deen's counsel, the Santa Fe has never denied that it is liable for such costs, nor has any Texas court so held. Deen's attorneys did file a motion to obtain execution therefor in the Texas Supreme Court prior to any decision or judgment by that court. The Texas Supreme Court instructed its clerk (March 25, 1958) to advise Deen's counsel that the demand for execution was not granted "at that time." This merely followed the usual practice not to issue piecemeal executions for appellate costs. As is true in most jurisdictions, where an appeal passes through several courts, the right to an execution does not accrue until the appeal has been finally disposed of. Merely to keep the record straight, the Santa Fe repeats that it is liable for the costs assessed against it in the United States Supreme Court on the former appeal, that it expects to pay them when this appeal is finally disposed of, subject to such offsets as it may be entitled

to by reason of costs it has incurred and paid and which are assessed by any court against Deen.

JURISDICTION

While the respondent (Santa Fe) concedes that under the judicial code *(28 U.S.C.A., Sec. 1651)* and under its own rules *(Rules 30 and 31)*, the Supreme Court of the United States has authority to issue a mandamus, it denies that such jurisdiction exists to issue a mandamus to a state court in a cause where no final judgment has been entered and no substantial federal question is raised, as required by the judicial code *(28 U.S.C.A., Sec. 1257)*.

QUESTIONS PRESENTED

I. Jurisdiction. As above set out.

II. Whether the fact that this is a Federal Employers' Liability Act case creates an exception to the uniform rule that the Supreme Court of the United States will never issue a mandamus where a petitioner has the right of review by certiorari or appeal.

III. Whether the mandate of the United States Supreme Court in this case, which remanded the cause for further proceedings, should have been construed by the Texas courts as a mandate ordering the affirmance of the trial court's judgment, without the right to consider matters not disposed of by the United States Supreme Court.

ARGUMENT WITH REFERENCE TO JURISDICTION

This argument relates to jurisdiction in the loose sense, so as to cover both the first and second "Questions Presented." We concede the inherent jurisdiction of any court to issue mandamus, which in the case of the United States Supreme Court is confirmed by the judicial code and its own rules. What we question is whether the power of mandamus of the United States Supreme Court of the United States can and should be used to expand its control over state court proceedings, where no right under the United States Constitution has been denied to a litigant. Deen's statements with reference to the finality of the decision of the Supreme Court of Texas are not correct, but solely for the purpose of this point, if we concede that the decision of the Supreme Court of Texas constituted a remanding to the trial court for a new trial, no federal question is presented.

Since the beginning of our judicial system (see *Steimmetz vs. Currey*, 1 Dal. 234, 1 U.S. 234, 1 L.Ed. 115) the granting of a new trial because the jury's verdict was against the overwhelming weight or preponderance of the evidence has been held not to be the denial of a right of trial by jury. This holding is universal. *50 C.J.S., Sec. 128, p. 854; 31 Am. Jur. Sec. 17, p. 24.* Among the cases by the United States Supreme Court so holding are:

Sinclair vs. Cooper, 108 U.S. 352, 27 L.Ed. 751; 2 S.Ct. 754

Metropolitan R.R. Co. vs. Moore, 121 U.S. 558, 30 L.Ed. 1022, 7 S.Ct. 1334;
L. & N. R. Co. vs. Woodson, 134 U.S. 614, 33 L.Ed. 1032, 10 S.Ct. 628;
Montgomery Ward & Co. vs. Duncan, 311 U.S. 243, 85 L.Ed. 147, 61 S.Ct. 189;
Arkansas Valley L. & C. Co. vs. Mann, 130 U.S. 69, 32 L.Ed. 854, 9 S.Ct. 458;
L. & N. R. Co. vs. Holloway, 246 U.S. 525, 62 L.Ed. 867, 38 S.Ct. 379;
Dimick vs. Schiedt, 293 U.S. 474, 79 L.Ed. 603, 55 S.Ct. 296;
Koenigsberger vs. Richmond Silver Mining Co., 158 U.S. 41, 39 L.Ed. 889, 15 S.Ct. 751.

A few of the circuit court cases are:

Daffinrud vs. U. S. (7th Cir.) 145 F. 2d 724;
Aetna Casualty & Surety Co. vs. Yeatts, 122 F. 2d 350;
Cheffey vs. Penn R. Co., 79 F.Supp. 254.

Probably the most frequently cited case by a federal court on this point is *Mt. Adams & E. P. Ry. Co. vs. Lowery* (6th Cir.) 74 F. 463, which contains an extensive review of many state and federal cases.

Every state court recognizes that the power of the trial judge to grant a new trial because the verdict is against the overwhelming weight and preponderance of the evidence is not a denial of a right of trial by jury. Some states follow the same rule as the United States Supreme Court, that is, hold that such power is confined to the trial court and that an appellate court

is limited to the law question of whether there was enough evidence to require the submission of the case to the jury. Other states, like Texas, grant authority to an appellate court to exercise the same discretion that the trial court exercised and to set aside a verdict as being against the overwhelming weight and preponderance of the evidence. As might be expected, there is some divergence among the states as to the exact application of the right of an appellate court to reverse a verdict because against the overwhelming weight and preponderance of the evidence. Some state that the appellate court has the same discretion as the trial court. Others, while stating that the appellate court has such power, state that as a matter of policy it should be exercised with caution. There are variations between these two extremes.

We do not have a complete tabulation of all of the states as to whether or not under their practice an appellate court may reverse and remand because the verdict is against the overwhelming weight and preponderance of the evidence. Of the states which we have reviewed, slightly more than fifty per cent recognize that power in both the trial court and in the appellate court. All of the states recognize the power one place or the other, and all of the states hold that granting such new trial is not a denial of a trial by jury. The following list on a "one case per state basis" contains both the states where the right to grant a new trial because the verdict is against the overwhelming weight and preponderance of the evidence is confined to the trial court and those which grant the same power to an appellate court. Since in both situations

it is uniformly held that there is no denial of a trial by jury as a result of such principle, we are listing them without discrimination:

Perry vs. Fowler (Cal.) 229 P. 2d 46;
Fell vs. Hancock Mutual Life Ins. Co., 76 Conn. 495;
L. & N. R. Co. vs. Grant (Ky.) 27 S.W. 2d 980;
Bannister vs. N.C. & St. L. Ry. (Tenn.) 3 S.W. 2d 1053;
Pruitt vs. West V. N. R. Co. (W.Va.) 51 S.E. 2d 105;
Camp vs. Atlantic C. R. Co. (Ala.) 36 So. 2d 331;
White vs. McCoy (Miss.) 7 So. 2d 886;
Murphy vs. Palmer (R.I.) 73 R.I. 182;
Bradley vs. Philhower (Ariz.) 299 P. 2d 648;
Gossard vs. Watson (Colo.) 221 P. 2d 353;
McDonald vs. Metro St. Ry. (N.Y.) 60 N.E. 2d 282;
Loftin vs. Howard (Fla.) 82 So. 2d 125;
Burke vs. Reiter (Iowa) 40 N.W. 2d 907;
Ireton vs. Ireton (Kan.) 63 Pac. 429;
Winslow vs. Fisher (Ind.) 37 N.E. 2d 280;
Benson vs. Georgia S. & F. Ry. (Ga.) 115 Ga. 330;
Triplett vs. Beeler (Mo.) 268 S.W. 2d 814;
Hawley vs. Powell (N.C.) 24 S.E. 2d 523;
Byers vs. Vargo (Pa.) 133 A. 2d 163;
St. L. & S. F. R. Co. vs. King (Okla.) 278 P. 2d 845;
James vs. Hood (N.M.) 19 N.M. 234.

In Texas, and in some of the other states, the intermediate appellate court is given this jurisdiction and it is denied to the Supreme Court, and in others the jurisdiction is vested in the Supreme Court. Irrespective of that, all of the authorities hold that where the reversing for a new trial by the appellate court has the same effect as the granting of a new trial by the trial court, there is no denial of any constitution's requirement of a jury trial. For example, the Supreme Court of the United States, in *Metropolitan R.R. Co. vs. Moore* (supra) had a District of Columbia statute dealing with the granting of a new trial or the requiring of a remittitur by judges other than the judge who tried the case, recognized the variety of practice and that some states vested this authority in both the trial and in the appellate court. Deen has cited no case to the contrary, and because of the universality of the holding that the granting of a new trial by either a trial court or an appellate court is not the denial of a trial by jury, we assert with more than the usual certainty that there is no case or authority so holding.

Many courts consider the principle to be the same as the authority of the trial court and the appellate court, where authorized by statute or constitution of the particular state, to require a remittitur because of the same essential finding, that is, that the jury's award is excessive and against the overwhelming weight and preponderance of the evidence. This has been held time and time again not to deny a jury trial.

Arkansas Valley L. & C. Co. vs. Mann, 130 U.S. 69, 32 L.Ed. 854, 9 S.Ct. 458;

Southern Ry. vs. Bennett, 233 U.S. 80, 58 L. Ed. 860, 34 S.Ct. 566;

T. & P. Ry. Co. vs. Hill, 237 U.S. 208, 59 L.Ed. 918, 35 S.Ct. 575;

L. & N. R. Co. vs. Holloway, 246 U.S. 525, 529, 62 L.Ed. 867, 870, 38 S.Ct. 379;

S.L. I.M. & S. Ry. Co. vs. J. T. Craft, 237 U.S. 648, 661, 59 L.Ed. 1160, 1165, 35 S.Ct. 704;

N. Y. Central and Hudson River R. Co. vs. Fraloff, 100 U.S. 24, 32, 25 L.Ed. 531, 534;

New York L. E. & W. R. Co. vs. Winter, 143 U.S. 60, 75, 36 L.Ed. 71, 80, 12 S.Ct. Rep. 356;

Herencia vs. Guzman, 219 U.S. 44, 55 L.Ed. 81, 31 S.Ct. Rep. 135.

For example, in *S.L. I.M. & S. Ry. Co. vs. Craft* (supra) there was an F.E.L.A. trial court judgment for the plaintiff in the amount of $11,000.00, the state Supreme Court required a remittitur of $5,000.00, and the Supreme Court of the United States said (59 L.Ed., p. 1165):

> "* * * the power, and with it the duty and responsibility, of dealing with this matter, rested upon the courts below. It involves only a question of fact, and is not open to reconsideration here."

We say, therefore, that there is no federal question involved and no jurisdiction.

Jett Brothers Distilling Co. vs. Carrollton, 252 U.S. 1, 64 L.Ed. 421, 40 S.Ct. 255;

McGoldrick vs. Gulf Oil Corp, 309 U.S. 2, 60 S.Ct. 375, 84 L.Ed. 536;

Stembridge vs. Georgia, 343 U.S. 541, 72 S.Ct. 834, 96 L.Ed. 1130;

Bachtel vs. Wilson, 204 U.S. 36, 27 S.Ct. 243, 51 L.Ed. 357.

MANDAMUS WILL NOT LIE

If we are wrong about jurisdiction, we are certainly not wrong about the proposition that mandamus will not be granted by this Court to any petitioner who could, at the time of the filing of the petition or at any future time, present his rights to the Supreme Court of the United States by appeal or certiorari.

Bankers Life & Casualty Co. vs. Holland, 74 S.Ct. 145, 346 U.S. 379, 98 L.Ed. 106;

Roche vs. Evaporated Milk Association, 63 S.Ct. 938, 319 U.S. 21, 87 L.Ed. 1185;

Ex Parte Fahey, 332 U.S. 258, 67 S.Ct. 1558, 91 L.Ed. 204;

Bank of Columbia vs. Sweeney, 26 U.S. 567, 7 L.Ed. 265;

American Construction Co. vs. Jacksonville, etc., Ry. Co., 148 U.S. 372, 13 S.Ct. 758, 37 L.Ed. 486;

State of Maryland vs. Soper, 46 S.Ct. 185, 270 U.S. 9, 70 L.Ed. 449;

Ex Parte Newman, 81 U.S. 152, 20 L.Ed. 877;

In Re Blake, 175 U.S. 114, 44 L.Ed. 94, 20 S.Ct. 42;

Ex Parte Roe, 234 U.S. 70, 58 L.Ed. 1217, 34 S.Ct. 722.

The classic statement is contained in the following quotation from *Ex Parte Newman*, supra (20 L.Ed. p. 879):

> "Application for a mandamus to a subordinate court are warranted by the principles and usages of law in cases where the subordinate court, having jurisdiction of a case, refuses to hear and decide the controversy, or where such a court, having heard the cause, refuses to render judgment or enter a decree in the case; but the principles and usages of law do not warrant the use of the writ to re-examine a judgment or decree of a subordinate court in any case, nor will the writ be issued to direct what judgment or decree such a court shall render in any pending case, nor will the writ be issued in any case if the party aggrieved may have a remedy by writ of error or appeal, as the only office of the writ when issued to a subordinate court is to direct the performance of a ministerial act, or to command the court to act in a case where the court has jurisdiction and refuses to act; but the supervisory court will never prescribe what the decision of the subordinate court shall be, nor will the supervisory court interfere in any way to control the judgment or discretion of the subordinate court in disposing of the controversy."

The most recent case (*Bankers Life & Casualty Co. vs. Holland*) reiterated the same principles.

Petitioner apparently recognizes the applicability of the foregoing principles and seeks to avoid same by charging a misconstruction or disregard of the mandate of the Supreme Court of the United States. This exact point has already been decided adversely to petitioner in *In Re Blake* (supra), which said:

> "Nevertheless, without inquiring whether the conclusions of the Supreme Court of Tennessee were or were not in harmony with the views expressed by this court, we are of the opinion that the remedy of petitioners for the alleged error in the decree of that court, if any, is by writ of error and not by mandamus."

Ex Parte Roe (supra) contains the same holding. As a matter of fact, in *Ex Parte Texas*, 315 U.S. 8, 86 L.Ed. 579, 62 S.Ct. 418 mandamus to a Texas court was denied after a mandate by the Supreme Court of the United States, when the Texas Supreme Court pointed out that the Court of Civil Appeals' jurisdiction to reverse and remand included the authority to reverse and remand because the finding of the jury was against the overwhelming weight and preponderance of the evidence, in which case a new trial would be granted. The concluding paragraph of that opinion reads:

> "We must accept the return of the Texas judges regarding the scope of judicial review of orders of the Texas Railroad Commission, as well as their showing *regarding the distribution of judicial powers within the Texas judicial system. These are matters of local law.*" (Italics ours.)

Simply stated, the fact that there is a contention made, sound or unsound, that the mandate of this Court has been misconstrued or not properly applied does not take the case out of the general rule that mandamus will not lie where there is a remedy by certiorari or appeal.

Petitioner next seeks to escape the universal principle above set out by contending that mandamus is essential because certiorari will not lie at the present time.

He is, of course, correct that a judgment which merely remands a case for a new trial is not a final judgment which will sustain certiorari. See *Market Street R. Co. vs. R. R. Commission*, 324 U.S. 548, 65 S.Ct. 770, 89 L.Ed. 1171, and the authorities on this point in the Santa Fe's reply to Deen's petition for certiorari in this same cause. If that were grounds for granting a mandamus, then every case in which there was a remand would become one in which mandamus was proper. Put another way, Deen argues, this judgment is not final, therefore mandamus will lie. This is in direct conflict with the decisions of the Supreme Court of the United States and the statute itself, which requires a "final judgment" before jurisdiction of the United States Supreme Court attaches. More practically, to sustain the contention would mean that where a state court remanded any cause for a new trial, mandamus would lie if certiorari would not. This, of course, is another way of saying that mandamus would take the place of certiorari in remanded causes.

See, for example:

Ex Parte Whitney, 13 Pet. 404, 10 L.Ed. 221;
Maryland vs. Soper, 46 S.Ct. 185, 270 U.S. 9, 70 L.Ed. 449.

In addition, of course, the granting of a mandamus would be an attempt to supervise the exercise of the judicial discretion vested in the state court. That mandamus will not be issued for such purpose is illustrated by:

Holloway vs. Whitely, 4 Wall (U.S.) 522, 18 L.Ed. 335;
Interstate Commerce Commission vs. United States, 289 U.S. 393, 77 L.Ed. 1278, 53 S.Ct. 607;
Life & F. Ins. Co. vs. Adams, 9 Pet. 573, 9 L.Ed. 234;
In Re Morrison, 147 U.S. 14, 37 L.Ed. 60, 13 S.Ct. 246;
Ex Parte Flippin, 94 U.S. 348, 24 L.Ed. 194;
In Re Burdett, 127 U.S. 771, 32 L.Ed. 321, 8 S.Ct. 1394.

However, if the Texas courts have misconstrued the mandate of this Court, or have denied Deen any right guaranteed to him by the United States Constitution, or by any statute passed by Congress, the remanding of the case to the trial court for a new trial will not deprive him of the right to assert the error which he now complains of, when this case is finally disposed of. There are many cases so holding, but the most obviously in point is the case of *Urie vs. Thomp-*

Urie, 337 U.S. 163, 93 L.Ed. 1282, 69 S.Ct. 1018. This was an F.E.L.A. case seeking recovery by a fireman from the receiver of a railroad for silicosis contracted during his employment. On the first trial in the state courts of Missouri, the Supreme Court of Missouri denied a recovery on the theory that the Federal Employers' Liability Act did not authorize a recovery for an occupational disease. The Supreme Court of Missouri reversed and remanded the cause to the trial court. It was tried a second time in the trial court under amended pleadings where the plaintiff sought to recover under the Boiler Inspection Act. On the second appeal, the Missouri Supreme Court denied a recovery on that ground. The Supreme Court of the United States, in its decision, expressly and positively held that, even though Urie did not raise the same point in the Missouri Supreme Court on the second appeal, he could, after judgment on the second appeal, apply to the Supreme Court of the United States for certiorari for a review by the Supreme Court of the United States of the ruling by the Supreme Court of Missouri on the first appeal. While there was a dissent, the dissent was on the merits and not on a point here important. Therefore, if Deen had been deprived of any right guaranteed him by the Constitution or statutes of the United States (which he has not), his rights to have the point decided by certiorari is certainly guaranteed by the Urie case, as well as many prior cases to the same effect.

There is one technical point that should be mentioned. The mandate of the Supreme Court of the United States went to the Court of Civil Appeals at

Eastland. Deen does not complain of the decision of the Eastland Court of Civil Appeals, and in effect asks that the Supreme Court of the United States mandamus the Supreme Court of Texas to affirm the judgment of the Court of Civil Appeals. The petition here for mandamus is directed at the Texas Supreme Court. The Texas Supreme Court remanded the cause to the Court of Civil Appeals at Eastland, and Deen, instead of waiting until the case got to the Eastland Court of Civil Appeals, filed a motion in the Supreme Court of Texas to have the mandate recalled, so that he could proceed directly against that court. Deen by his own actions has prevented the cause from going to the Eastland Court of Civil Appeals, to whom the mandate of the Supreme Court of the United States went. Quite obviously, his correct remedy, if he has a remedy by mandamus, was to have the mandate of the Supreme Court of Texas go to the Eastland Court of Civil Appeals and then apply to the Supreme Court of the United States for mandamus directed to that court, requiring it to follow the mandate of the Supreme Court of the United States and not that of the Texas Supreme Court.

Again we repeat that the Supreme Court mandate has not been disregarded, nor has Deen been deprived of any "federal right", but if he was, he certainly sought mandamus at the wrong time against the wrong court. The reason for this is obvious, and that is that the Court of Civil Appeals, under the mandate of the Texas Supreme Court, may hold exactly what Deen wants it to hold, that is, that the verdict of the Texas jury was not against the overwhelming weight

and preponderance of the evidence. If it does so hold, Deen's mandamus application is entirely unnecessary, and until the Court of Civil Appeals has remanded this cause for a new trial, any application for mandamus is certainly premature. Further, until the Court of Civil Appeals acts, any mandamus by this Court would be the supervision by this Court of the exercise by the Eastland Court of Civil Appeals of its judicial discretion.

Deen's final contention for mandamus seems to be in effect that, because this is an F.E.L.A. case, there is an automatic exception in his favor to all provisions of the Constitution, the statutes, rules of court, and decisions. Deen apparently construes the comments of Justices Jackson, Roberts, and Frankfurter in dissenting opinions, as well as those of various circuit court and state court judges, as recognizing an intention by the majority of the Supreme Court of the the United States to create, in F.E.L.A. plaintiffs, a preferred class of litigants for whom exceptions will be found to all rules, which exceptions are not available to other litigants. If that position correctly represents the intention of this Court, then, of course, mandamus will lie in this case. The respondent's answer to that contention is that this Court has not yet so held, and until it does, we construe the principle "equal justice under law" as prohibiting a favored class of litigants.

Lastly, as evidence of the desire and intent of Deen to have a "piecemeal appeal" under the guise of mandamus, we call the Court's attention to the fact that he not only wants the Supreme Court of Texas

mandamused, but he wants the mandamus to be "without prejudice to Deen's right to seek review of such remittitur by this Court by petition for writ of certiorari." See motion for leave to file petition for mandamus, p. 18.

It is respectfully submitted that Deen's petition for mandamus should be denied or dismissed.

ON THE MERITS

Under this general heading we will present argument under the third "Questions Presented", above set out, the substance being that the Supreme Court of Texas did not disregard the mandate of the United States Supreme Court in this cause. The opinion of the Supreme Court of Texas is a complete answer to Deen's entirely unwarranted statements that the Supreme Court of Texas deliberately and intentionally disregarded the mandate of the Supreme Court of the United States. If "advocate's license" can be used to excuse reputable counsel for making such a charge, certainly it must be said that the record in this case on its face conclusively denies that there was any justification for it.

The Texas Supreme Court, in its opinion, carefully and with clarity explained not only why its decision was not in disregard of the mandate of the Supreme Court of the United States, but also with equal care and with equal lucidity explained what it was doing and why it was doing it. Because of the care and detail of the Texas Supreme Court's opinion, it may be presumptuous for counsel to elaborate or present ar-

guments in support of it. But with the statement, "Fools rush in where angels fear to tread," and the excuse that Deen, both in his petition for mandamus and in his petition for certiorari, has not correctly stated either the decision of the Supreme Court of Texas nor the reasons for it, we present an argument.

In our hurry to reach the principle points, we are passing over a number of incorrect statements in Deen's petition for mandamus and his petition for certiorari. Some of these will be picked up as we go along, but rather than be involved in a bicker, we will merely state the record correctly in most instances without commenting on the fact that Deen has stated it to the contrary.

The question presented by Deen is:

> "Whether The Supreme Court of Texas has violated the mandate of the Supreme Court of the United States in directing the Court of Civil Appeals of Texas to inquire into the sufficiency of the evidence to support the jury's conclusion that employer negligence played a part in producing petitioner's injury, etc." (See Petition for Mandamus, p. 10.)

Of course, that is not what the Supreme Court of Texas did at all. What the Supreme Court of Texas decided were two questions (see 312 S.W. 2d 933):

> "The principal questions are narrow ones involving the impact of the Supreme Court judgment of reversal upon the factual jurisdiction of our Courts of Civil Appeals. The factual powers in question are: (a) that of reversing and remanding for a new trial, when the court believes

> the verdict or the fact findings of the trial judge to be so against the great weight and preponderance of the evidence as to be manifestly wrong notwithstanding they may be supported by some evidence of substantial character; (b) that of requiring as a condition of affirmance and alternative to reversal and remand for a new trial a remittitur of such portion of the damages as the court considers excessive."

Deen's attorney states time and time again that the Supreme Court of the United States passed on the "weight and preponderance of the evidence" when it reversed the holding of the Texas Court of Civil Appeals that there was "no evidence" to justify the submission of the issue. The Texas Supreme Court's opinion contains a correct statement of the distinction between a holding by a trial or appellate court that there was enough evidence to justify the submission of the case to the jury and to prohibit the direction of a verdict or the reversal and rendition by the appellate court, and a holding by the trial court or by the appellate court, that, although there was enough evidence to justify the submission of the case to the jury, the whole evidence requires the court to grant a new trial because the verdict is against the overwhelming weight and preponderance of the evidence. Deen's two petitions (certiorari and mandamus) would lead one to believe that this distinction was discovered by the Supreme Court of Texas in this case, whereas the very distinction was made thousands of times by hundreds of different courts.

The following quotations negative such contention.

We would first like to refer the Court to *Metropolitan R. R. Co. vs. Moore*, 121 U.S. 558, 30 L.Ed. 1022, 7 S.Ct. 1334, and the whole opinion of this Court in that case, from which we take the following quotations, which we think are the essence of that holding. The quotations begin on page 1024, 30 L.Ed. page 567, 121 U.S.

> "Upon this point, the Supreme Court of the District of Columbia, in *Stewart v. Elliott*, 2 Mackey, 307, 315, said: 'By a loose use of language, it may be said that a verdict "*contrary to the evidence*," or "against the weight of evidence;" was rendered upon "*insufficient evidence;*" and, on the other hand, that a verdict upon insufficient evidence is one contrary to or against the weight of evidence. But we are dealing with legal expressions in their technical meaning; and it is familiar to all lawyers that evidence offered to a jury in a cause has a two-fold sufficiency, i.e., sufficiency in law and sufficiency in fact; that of its sufficiency *in law* the court is the exclusive judge; its sufficiency *in fact* is a question exclusively for the jury. The court, in considering the legal sufficiency of the evidence to sustain the case of a suitor, or to establish any particular fact essential to his recovery, must examine the proof with respect to its quality and quantity; and this determination by the court is a question of law. And if the court can see that the proof offered is of such a character and volume that it might well satisfy a rational mind of the truth of the position it is introduced to maintain, then it is declared to be *legally sufficient* for the purpose; and it must be submitted to the jury, who are the exclusive judges of its sufficiency *in fact*, whether others

may differ from them in their conclusions or not . . . .'"

* * * * *

". . . It is admitted that according to established rules of procedure in such cases, it is customary and proper for courts of justice, sitting in the trial of causes by jury, to set aside verdicts and grant new trials in both classes of cases; that is, where the verdict rests upon evidence which is either insufficient in law or insufficient in fact."

* * * * *

"So upon the whole evidence in the case the testimony in support of the cause of action, or of the defense, may be so slight, although competent in law, or the preponderance against it may be so convincing, that a verdict may be seen to be plainly unreasonable and unjust. In many cases it might be the duty of the court to withdraw the case from the jury, or to direct a verdict in a particular way; and yet, in others, where it would be proper to submit the case to the jury, it might become its duty to set aside the verdict and grant a new trial."

* * * * *

". . . It is true that motions to grant a new trial, upon the ground that the verdict is against the weight of the evidence, are, in a certain sense, addressed to the discretion of the court, and can be more satisfactorily dealt with by the judge who tried the cause and who had the opportunity of seeing the witnesses and hearing them testify. And this furnishes one of the reasons why ordinarily a writ of error or an appeal will not lie for the purpose of revising and controlling the exercise of that discretion by an appellate tribunal; yet in some of the States a contrary practice prevails, and a writ of error is authorized

to bring up for review the proceedings and judgment of an inferior court, on which it may be assigned as an error in law, upon a bill of exceptions setting forth the whole evidence, that the court below error in not granting a new trial because the verdict was against the weight of the evidence."

* * * * *

"It is urged in argument, however, that the error did not prejudice the plaintiff in error, because the court necessarily passed upon the same matter in considering and sustaining the ruling of the court at special term in refusing to instruct the jury to return a verdict in favor of the defendant upon the evidence offered by the plaintiff; but the question arising on this ruling, and that on the motion for a new trial at the conclusion of the whole evidence, were not identical. It might well be that on the plaintiff's evidence there was a case sufficiently made out to submit to the jury, while on the whole testimony it might fairly be a question whether the verdict was not against the weight of the evidence, in that sense which would justify the court in granting a new trial. Of course nothing we have said in this opinion is to be construed as indicating any rule of decision in such cases, or is intended in the least to narrow the province of the jury as the proper tribunal for determining questions of fact in trials at common law. The relation of the court to the jury, together constituting the appointed tribunal for the administration of the law in such cases, is regulated by fixed and settled maxims. The legal discretion of the Supreme Court of the District, whether sitting at general or special term, in granting or denying motions to set aside verdicts and grant new trials, is not

> by law submitted to the review of this court. The only point in judgment here is that the plaintiff in error was entitled by law to have that discretion exercised by the supreme court at general term, and that that court committed an error of law in refusing to consider his appeal from the order at special term denying his motion for a new trial, based on the ground that the verdict was against the weight of the evidence.
>
> "*For this error, the judgment of the Supreme Court of the District of Columbia at General Term is reversed, and the cause remanded, with directions to take further proceedings therein in conformity with this opinion.*"

An assertion that the *Moore* case is in point would seem to be a vast understatement. The Supreme Court of the United States in that case had before it exactly the same point that the Supreme Court of Texas had before it in the Deen case. The Supreme Court of the United States made the same distinction between "no evidence" and the "overwhelming weight and preponderance of the evidence" that the Texas Supreme Court made in the Deen case, and the Supreme Court of the United States, because of the error of a lower court in refusing to pass on "the weight and sufficiency of the evidence", remanded the *Moore* case to the lower court with instructions to do exactly what the Texas Supreme Court instructed the Court of Civil Appeals to do in this case, that is, pass on the question of whether the verdict was against the overwhelming weight and preponderance of the evidence. Unless Shepard's Citator has missed it, the *Moore*

case has never been overruled or qualified on this point.

A shorter and less detailed statement of the same principles recognized and applied in the *Moore* case is contained in the following quotation from *Garrison vs. United States* (4th Cir.), 62 F. 2d 41, p. 42:

> "There seems to be some confusion on the part of counsel as to the difference between the duty to direct a verdict and the duty to grant a new trial after verdict; and the contention is frequently made that the judge should direct a verdict whenever the evidence is such that he would be justified in setting the verdict aside. The distinction, however, is clear. Where there is substantial evidence in support of plaintiff's case, the judge may not direct a verdict against him, even though he may not believe his evidence or may think that the weight of the evidence is on the other side; for, under the constitutional guaranty of trial by jury, it is for the jury to weigh the evidence and pass upon its credibility. He may, however, set aside a verdict supported by substantial evidence where in his opinion it is contrary to the clear weight of the evidence, or is based upon evidence which is false; for, even though the evidence be sufficient to preclude the direction of a verdict, it is still his duty to exercise his power over the proceedings before him to prevent a miscarriage of justice."

We have heretofore stated, and again state, that every court whose decision we have read makes exactly the same distinction that the Texas Supreme Court makes, that this Court made in the *Moore* case and in others, and that the Circuit Court made in the

foregoing quotation. Rather than repeat unnecessarily a matter which is not subject to dispute, we respectfully refer the Court to the authorities from the circuit courts and the state courts listed on pages 5, 6 & 8 of his brief.

Therefore, we say that the plaintiff's assertion that the Supreme Court of the United States passed on the question of "the overwhelming weight and preponderance of the evidence" is untrue, as is his assertion that the distinction made by the Supreme Court of Texas is unjustified. As a matter of fact, the Supreme Court of the United States has held very consistently that it does not have jurisdiction to pass upon issues of the overwhelming weight and preponderance of the evidence. Some of these cases have heretofore been cited or quoted from. For ready reference, however, on this point, we refer to:

Smiley vs. Kansas, 196 U.S. 447, 25 S.Ct. 289, 49 L.Ed. 546;

Aetna Life Ins. Co. vs. Dunken, 266 U.S. 389, 45 S.Ct. 129, 69 L.Ed. 342;

Great A. & P. Tea Co. vs. Supermarket Equipment Corp., 340 U.S. 147, 95 L.Ed. 162, 71 S.Ct. 127;

Graver Tank & Mfg. Co. vs. Linde Air Products Co., 336 U.S. 271, 93 L.Ed. 672, 69 S.Ct. 535.

If this Court passed on the "overwhelming weight and preponderance of the evidence" in the first certiorari in this Deen case, then it has the power to do

so in all cases. If it has the power to pass on the overwhelming weight and preponderance of the evidence, it is not, like the Supreme Court of Texas, a court passing only on questions of law and without jurisdiction of fact issues. If it has no such power, then certainly it did not pass on the question of overwhelming weight and preponderance of the evidence in the former appeal in the Deen case.

As the Texas Supreme Court not unreasonably points out, since the Supreme Court of the United States has stated time and time again that it does not have jurisdiction to pass upon the "overwhelming weight and preponderance of the evidence", its decision and mandate in the Deen case cannot justly be construed as covering that very point. Put in reverse, Deen's contention is that the Supreme Court of the United States has a right, in F.E.L.A. cases, to pass on the overwhelming weight and preponderance of the evidence, which it does not have in other cases. If it has no such authority and jurisdiction, certainly it did not do so in this case.

We know no authority, and certainly Deen has cited none, for the proposition that a petition for mandamus can be used to serve the purpose of a motion for rehearing. That is the substance of what Deen is trying to do by his petition for mandamus, and that is to ask the Supreme Court of the United States to amend its mandate and to decide questions not decided by it on the original hearing.

Next, let us deal briefly with the law applicable to causes remanded by the Supreme Court of the United

States to the state court.

The first case to which we wish to refer this Court is *Schneider Granite Co. vs. Gast Realty & I. Co.*, 245 U.S. 288, 62 L.Ed. 292, 38 S.Ct. 125. We make the following quotations from 62 L.Ed., p. 294:

> "A judgment of the supreme court, which had affirmed a judgment of the circuit court of the city of St. Louis sustaining the tax (259 Mo. 153, 168 S.W. 687), *was reversed, and the cause remanded for further proceedings not inconsistent with the opinion of this court* (240 U.S. 55, 60 L.Ed. 523, 36 Sup.Ct.Rep. 254)." (Italics ours.)
>
> * * * * *
>
> "These contentions must be tested by the true intent and meaning of the mandate of this court, and, so tested, both must be overruled. *The mandate, while reversing the judgment that was under review on the former writ of error, permitted further proceedings of any kind to be had in the state courts, provided they were not inconsistent with the opinion of this court. It left the tribunals of the state at liberty to exercise their proper jurisdiction in the cause between the parties, so long as they avoided a conflict with the rights of the landowners under the 14th Amendment, as established by our decision.*" (Italics ours.)

The next case is *Georgia Ry. & Electric Co. vs. Decatur*, 297 U.S. 620, 56 S.Ct. 606, 80 L.Ed. 925, and we quote from 80 L.Ed., p. 927:

> "April 29, 1935 (295 U.S. 165, 79 L.ed. 1365, 55 S.Ct. 701), we reversed the decree pronounced by the Supreme Court of Georgia in this cause, September 18, 1934 (179 Ga. 471, 176 S.E. 494),

and sent it back for further proceedings not inconsistent with the accompanying opinion."

* * * * *

"After the first decree was reversed and set aside, the cause went back for disposition by the Supreme Court. Our mandate restricted its powers in that regard so far as necessary to prevent conflict with rulings here, but not otherwise. Only federal questions were open for our determination. We accepted the construction placed upon the statutes by the Supreme Court and held that so to apply them would deprive appellants of a federal right. We suggested no interpretation of our own and did not affirmatively indicate the further action to be taken. Schneider Granite Co. v. Gast, 245 U.S. 288, 291, 62 L.ed. 292, 295, 38 S.Ct. 125. The decree now under consideration is not in conflict with anything said or done by us. Appellants' claim to the contrary is not well founded. Without exceeding the limitations prescribed, the Supreme Court reconsidered the cause, put its own construction upon the statutes, and adjudged accordingly."

The third case is *Sprague vs. Ticonic National Bank*, 307 U.S. 171, 59 S.Ct. 777, 83 L.Ed. 1184.

That the above cases are still the law is evidenced by the following quotation from Judge Frankfurter's opinion in that case (83 L.Ed., p. 1188):

"But that leaves us still to consider whether the immediate issue now in controversy was disposed of in the main litigation and therefore by the mandate. While a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues. See Re Sanford Fork & Tool Co., 160 U.S. 247, 40 L.ed. 414,

16 S.Ct. 291; Ex parte Century Indem. Co., 305 U.S. 354, ante, 216, 59 S.Ct. 239."

We know of no reason (and Deen's attorney certainly presents none) why the above rules are not applicable to Federal Employers' Liability cases. State courts have uniformly so construed them. See, for example:

Ellis vs. Union Pack R. Co., 329 U.S. 649, 67 S.Ct. 598, 91 L.Ed. 572; after remand to the state court, 27 N.W. 2d 921;

Keeton vs. Thompson, 326 U.S. 689, 67 S.Ct. 598, 91 L.Ed. 572; after remand to the state court, 191 S.W. 2d 954;

Pauly vs. McCarthy, 330 U.S. 802, 67 S.Ct. 962, 91 L.Ed. 1261; after remand to the state court. 184 P. 2d 123;

Stone vs. New York C. & St. L. R. Co., 344 U.S. 407, 73 S.Ct. 358, 97 L.Ed. 441; after remand to the state court, 260 S.W. 2d 532.

When the Supreme Court of the United States wants to preclude the state court from considering assignments it did not pass on, it does so in positive and unequivocal language. That can be demonstrated quickly and conclusively by using only one advance sheet. If the Court will look in the Lawyers' Edition railroad cases, or Jones Act cases, reported. Three of these are cited in the opinion of the Supreme Court of advanced sheet for March 11, 1957, it will find five the United States in the Deen case. They are:

Rogers vs. Missouri Pacific R. Co., 353 U.S. 500, 1 L.Ed. 2d 493;

Webb vs. Illinois Central R. Co., 352 U.S. 512, 1 L.Ed. 2d 503;

Ferguson vs. Moore-McCormick Lines, Inc., 352 U.S. 521.

Let us take those three cases and see what the Supreme Court of the United States did when it did in fact consider matters included in the state court brief but not passed on there.

We quote from the *Rogers* case (1 L.Ed. 2d, page 502):

> "We have considered the remaining questions not passed upon by the Supreme Court of Missouri, and find them to be unsubstantial. Accordingly, we remand the case for proceedings not inconsistent with this opinion."

We quote from the *Webb* case (1 L.Ed. 2d, page 507):

> "We have considered the remaining questions, not passed upon by the Court of Appeals, and find them to be unsubstantial. Accordingly, we remand the case for proceedings in conformity with this opinion."

In the *Ferguson* case, no discussion of other points was contained in the opinion.

However, in another case decided the same day, *Pennsylvania R. Co. vs. Rychlik*, the concluding sentence (1 L.Ed. 2d, page 490) is as follows:

> "The decision below must therefore be reversed and the case remanded to the District Court with instructions to dismiss the complaint."

Deen's position is unsound, unless the mandate and decision in this case means the same thing that it did in the *Rogers*, *Webb*, and *Rychlik* cases. If that is true, two equals nine, and cows are pigs.

Deen, in his two briefs (petition for mandamus and petition for certiorari) is careful not to state positively that the question of "overwhelming weight and preponderance of the evidence" was presented by him in his petition for certiorari on the original appeal in this cause. The petition originally presented in this cause, and resulting in the remanding of this case to the Court of Civil Appeals at Eastland, shows that that issue was not presented by Deen to this Court on the prior appeal, except to the extent that he asked the Court not only to reverse the Court of Civil Appeals but also to affirm the judgment of the trial court. As the Texas Supreme Court not unreasonably points out, since the Supreme Court of the United States did not order the judgment of the trial court affirmed, any such contention by Deen was either not passed on or overruled by the Supreme Court of the United States. If it was overruled, then the petition for mandamus is a motion for rehearing. If it was not passed on, the Texas courts were free to decide it.

For example, we quote from the case of *Hartford Life Insurance Company vs. Blincoe*, 255 U.S. 129, 65 L.Ed. 549, 41 S.Ct. 276, quoting from 65 L.Ed., page 552:

". . . The most that can be said of any question that was decided is that it became the law of the case, and, as such, binding on the supreme court of the state, and to what extent binding is explained in Messenger v. Anderson, 225 U.S. 436, 56 L.ed. 1152, 32 Sup. Ct. Rep. 739. *Certainly omissions do not constitute a part of a decision and become the law of the case, nor does a contention of counsel not responded to.* (Italics ours.)

* * * * *

"It was urged, it is true, in the brief of counsel, that the assessment 'was void because it included money for taxes erroneously claimed to be enacted [exacted] under the laws of Missouri.' No notice, however, was taken of the contention and no influence given to it or to the effect it asserted. *If it made any impression at all, it was obviously as a state question, dependent upon the state statutes, upon which we would naturally not anticipate the state courts, the case necessarily going back to them.*" (Italics ours.)

Additional authorities are:

Chas. Wolff Packing Co. vs. Court of Industrial Relations of Kansas, 267 U.S. 552, 69 L.Ed. 785, 45 S.Ct. 441;

Mutual Life Ins. Co. vs. Hill, 193 U.S. 551, 48 L.Ed. 788, 24 S.Ct. 538.

On page 15 of Deen's petition for mandamus he cites the case of *Ex Parte Texas*, 315 U.S. 8, 86 L.Ed. 579, 62 S.Ct. 418. We agree with him that the case is in point here, because in that case the Supreme Court of the United States had granted certiorari to

the Texas court and had reversed and remanded under a mandate not substantially different from that in the Deen case. See *Lone Star Gas Co. vs. Texas*, 304 U.S. 224, 58 S.Ct. 883, 82 L.Ed. 1304. We probably should add that there, as here, the case was remanded to the Court of Civil Appeals, and subsequently the Court of Civil Appeals of Texas wrote another opinion, and the Supreme Court of Texas granted a writ and wrote another opinion (see 153 S.W. 2d 681). The Supreme Court of Texas opinion indicated that it construed the opinion of the Supreme Court of the United States as passing upon the sufficiency of the evidence to support the verdict (see 86 L.Ed., p. 585), and it therefore remanded the case to the trial court, indicating that the trial court could not reopen the question because it was foreclosed by the Supreme Court of the United States. There, as here, a petition for mandamus was filed against the Supreme Court of Texas, and in its opinion on the mandamus (being the one which Deen has cited in his brief) the Supreme Court of the United States first specifically negatived any intent that its opinion should be construed as foreclosing the relitigation of the issue, subject to the rules of law contained in its opinion, and then refused to issue a mandamus because, in spite of the misconstruction by the Texas court, no ground for mandamus was shown. We quote from that opinion (86 L.Ed., p. 586):

> "In their return, the Chief Justice and Associate Justices of the Supreme Court of Texas state that that Court 'would have rendered the same judgment if it had based the same solely

upon its construction of the State statute and not at all upon its construction of the opinion of this Court.' The return further showed that in remanding the cause to the District Court for a new trial the Supreme Court of Texas acted entirely pursuant to state law: '*The Court of Civil Appeals in this State has full power to set aside findings based on conflicting evidence and believed by it to be against the overwhelming weight and preponderance of the evidence and to remand the case for another trial;* but it is without power to set aside findings based on conflicting evidence and then make its own findings and render judgment thereon.'

"We read this return as a disclaimer by the judges of the Supreme Court of Texas of the construction placed upon their opinion by the petitioners in so far as it touches the scope of this Court's ruling in 304 US 224, 82 L ed 1304, 58 S Ct 883, and the effect of that decision upon the future course of this litigation. Specifically, we read the return as a disavowal by the Supreme Court of Texas that its action in reversing the Texas Court of Civil Appeals and ordering a new trial implied that our decision adjudicated the claim of confiscation or in any wise forecloses trial of that issue. Therefore, when the litigation goes back to the District Court, it will not be imprisoned within an adjudiciation to be attributed to this Court which this Court never made. *We must accept* the return of the Texas judges regarding the scope of judicial review of orders of the Texas Railroad Commission, as well as *their showing regarding the distribution of judicial power within the Texas judicial system. These are matters of local law.*" (Italics ours.)

Unless there is something which Deen's attorneys have found in the above case which does not appear in any of the opinions, it would seem obvious that the Supreme Court of the United States in *Ex Parte Texas*, upheld the practice of reversing and remanding by the Court of Civil Appeals because the verdict is against the overwhelming weight and preponderance of the evidence, and refused mandamus on that very ground. It would seem that, in *Ex Parte Texas*, the very point was decided against Deen.

Therefore, the issue of overwhelming weight and preponderance of the evidence was not passed on by the Supreme Court of the United States because:

(a) It was not presented by Deen;

(b) The Supreme Court of the United States never passes on "weight and preponderance of the evidence";

(c) The Supreme Court did not expressly pass on "the overwhelming weight and preponderance of the evidence", and since, had it passed thereon, it would have ordered the trial court's judgment affirmed, its remand to the Court of Civil Appeals without such instruction either left the question completely unpassed on or constituted an affirmative recognition that it was a matter that the Supreme Court of the United States did not have jurisdiction of.

Before passing to the next argument, we want to note Deen's statement (for example, see petition for mandamus, p. 15) that *if* the Court of Civil Appeals should remand the case for a new trial, the trial court would be required to instruct a verdict in favor of

the railway company under the decisions of the Texas courts. He cites no authority for that proposition, and, of course, the exact opposite is correct. The same thing would happen that happened in the *Lone Star Gas* case which we have referred to above, that is, the second trial would be a trial de novo except that the decision of the United States Supreme Court would be followed and all points decided by it.

> *Wichita Falls Traction Co. vs. Cook*, (S.Ct. Tex.) 60 S.W. 2d 764;
>
> *Sanders vs. Harder*, (S.Ct. Tex.) 227 S.W. 2d 206.

Deen's position, variously taken, that irrespective of what the law may be in other cases that this is an F.E.L.A. case and therefore different rules apply to it, requires some additional statements by this respondent.

For example, on page 11 of the petition for mandamus, Deen says:

> "While Deen has never conceded that the Texas appellate courts, *under federal procedure applicable to FELA, had authority, etc.*" (Italics ours.)

See, also, the petition for certiorari filed in this same cause, pages 9, 15, 18, 22 and 26, where the distinction between an F.E.L.A. case and other civil litigation is either mentioned or inferred.

Deen's position is that a plaintiff under the Federal Employers' Liability Act. (28 U.S.C.A., Sec. 56) is given the option of filing suit in either the state court

or the federal court. With that statement, of course, we agree. With his next contention, though, that when the plaintiff elects to file a case in the state court he is not bound by state rules of practice but by "federal procedure applicable to F.E.L.A.", we violently disagree. This Court has held to the contrary many times. As Mr. Justice Holmes said (*Dickinson vs. Stiles*, 246 U.S. 631, 62 L.Ed. 908, 38 S.Ct. 415) of F.E.L.A. actions in the state court:

> "It contemplated suits in state courts and accepted state procedure in advance. Minneapolis & St. L. R. Co. v. Bombolis, 241 U.S. 211, 60 L. ed. 961, L.R.A. 1917A, 86, 36 Sup. Ct. Rep. 595, Ann. Cas. 1916E, 505; Louisville & N. R. Co. v. Stewart, 241 U. S. 261, 60 L. ed. 989, 36 Sup. Ct. Rep. 586. We see no reason why it should be supposed to have excluded ordinary incidents of state procedure."

See also:

Second Employers' Liability Cases, 223 U.S. 1, 56 L.Ed. 327, ... S.Ct. ..... ;

L. & N. vs. Holloway, 246 U.S. 525, 62 L.Ed. 867, 38 S.Ct. 379;

L. & N. vs. Stewart, 241 U.S. 261, 60 L.Ed. 989, 36 S.Ct. 586;

C. & N.W. R. Co. vs. Gray, 237 U.S. 399, 59 L.Ed. 1018, 35 S.Ct. 620.

Any contrary rule means that, where a litigant is given the choice of bringing his suit in a state court or in a federal court, he is not bound by the rules of procedure of such court. The reverse, of course, is the

universal holding (21 *C.J.S.*, Sec. 527, p. 807, and *State of Missouri vs. Taylor*, 266 U.S. 200, 69 L.Ed. 247, 45 S.Ct. 47).

The Supreme Court of the United States would never hold constitutional an amendment by Congress to the Federal Employers' Liability Act which provided: "In all actions in the state court, under the Federal Employers' Liability Act, the Federal Rules of Civil Procedure shall govern." If Congress cannot do it, certainly the Supreme Court, which has no legislative powers or function, will not do so.

It is the purpose of the Constitution of the United States to protect and preserve the states and their independence and their judiciary, and it is the duty and obligation of the Supreme Court of the United States to protect the state, its government, and its courts.

In the words of Mr. Justice Stone in *Shamrock Oil & Gas Corp. vs. Sheets*, 313 U.S. 100, 85 L.Ed. 1214, 61 S.Ct. 868 (quoting from 85 L.E., p. 1219):

> "The power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution. 'Due regard for the rightful independence of state governments which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.' Healy v. Ratta, 292 US 263, 270, 78 L.ed. 1248, 1253, 54 S Ct. 700; see Kline v. Burke Constr. Co. 260 US 226, 233, 234, 67

L ed 226, 231, 232, 43 S Ct 79, 24 ALR 1077; Matthews v. Rodgers, 284 US 521, 525, 76 L ed 447, 451, 52 S Ct 217; cf. Elgin v. Marshall, 106 US 578, 27 L ed 249, 1 S Ct 484."

It should be noted that there was no dissent from Justice Stone's decision and that the above case dealt with procedure in a Texas court. Confining ourselves to cases dealing with Texas and announcing the same principle, we would refer the Court to *Schwartz vs. Texas*, 344 U.S. 199, 97 L.Ed. 231, 73 S.Ct. 232, and the celebrated case of *Texas vs. White*, 74 U.S. (7 Wall) 700, 19 L.Ed. 227

If a plaintiff in an F.E.L.A. case who elects to file his case in a state court is not to have his case tried under state rules of practice and procedure, what rules do the courts try them under? None? Under the Federal Rules of Civil Procedure? No one is foolish enough to think the United States Supreme Court is going to write a "Federal Rules of Procedure for F.E.L.A. Cases" or that it intends to do so. The only answer is that state procedure applies.

Deen cites no cases to the contrary. He cites a long list of cases on page 12 of the petition for certiorari, of which *Rogers vs. Missouri Pacific R. Co.* (supra) is typical. In each of those cases the Supreme Court of the United States overruled the holding of a lower court that there was "*no evidence*", and that judgment had to be rendered in favor of the defendant. That is exactly what this Court held in the Deen case on the first appeal. That is a law question. In none of those cases did this Court pass on "overwhelming

weight and preponderance of the evidence". Now, it has been said, by members of the Supreme Court of the United States in dissenting opinions, that in the cases listed the Supreme Court of the United States has required less evidence to raise a jury issue in F.E.L.A. cases than in other cases. It may be that the Supreme Court of Texas, respondent's attorney, and many of the circuit courts agree. However, no court and no attorney would deny that the passing upon the issue of "no evidence" is a question of law as to which the Supreme Court of the United States has jurisdiction, and that it is and should be the final judge of "some evidence" versus "no evidence" in all cases in which it has jurisdiction. Those authorities, therefore, are not contrary to the ones we have heretofore cited and quoted from, saying that trials in the state court under the Federal Employers' Liability Act shall be in accordance with state practice. The statement by this Court in such cases that local rules of practice cannot be enforced where they will *deny* the plaintiff a federal right must be read in the context of the opinions as applying to a rule which denies a recovery and not as to a rule of practice. No evidence is a question of law, and a decision by a state court that there is "no evidence" under local practice is a decision of law denying the plaintiff a right under a federal statute. That is not a rule of practice or procedure of a state court, which merely requires that the rights of a plaintiff in an F.E.L.A. case be determined by the same rules of practice and procedure that are applicable to all other civil litigants. We say those cases are not in point, and we further say that

in none of those cases did the Supreme Court of the United States pass on "the overwhelming weight and preponderance of the evidence". Nor in any of those cases did the Supreme Court of the United States hold that an F.E.L.A. plaintiff was not bound by state rules of practice.

The only case which plaintiff cites remotely indicating that a state rule of practice is not applicable in an F.E.L.A. case is *Arnold vs. Panhandle & Santa Fe Ry. Co.*, 353 U.S. 360, 77 S.Ct. 840, 1 L.Ed. 2d 889. That is a Per Curiam opinion, without any thorough discussion of this point, and frankly we cannot understand what the Court held. If Deen's theory is correct, then the Supreme Court of the United States certified as being a fair and just rule for trials of all types of civil litigation Federal Rule of Civil Procedure 49(b). This rule provided that where a jury returned a verdict containing special findings which conflicted with a general finding, the special findings would control. The Texas court, in the *Arnold* case, applied the same rule to a Texas special verdict. This Court reversed and remanded. To accept Deen's interpretation of the *Arnold* case would mean that the Supreme Court of the United States says Rule 49(b) is fair and just and applicable to all litigation in the federal courts, but that the Supreme Court of the United States says that the same rule applied by a state court in an F.E.L.A. case denies the F.E.L.A. plaintiff a constitutional right. Deen's attorneys believe the Supreme Court of the United States so held. The Santa Fe's attorneys refused to believe that the Court so held.

If Deen's attorneys are correct, then the majority of the Supreme Court of the United States has gone a long way to regulate rules of practice in a state court in F.E.L.A. cases. If Deen's attorneys' interpretation of the decision in the *Arnold* case is correct, then our argument is and must be that there is bound to be some limit and that surely the *Arnold* case represents the limit and the Supreme Court of the United States should not extend such a doctrine by applying it to the Deen case.

May we respectfully suggest that if the object of a trial of an F.E.L.A. case is "equal justice under law", that no rule of practice, state or federal, which applies equally to both plaintiff and defendant is an undue burden on either. Surely there is nothing unconstitutional about a rule of practice designed to give both parties a fair trial. May we further respectfully ask: If the situation had been reversed, and a Texas court had held that a verdict *against* Deen was against the overwhelming weight and preponderance of the evidence and reversed the cause for a new trial, would a federal question arise? Would this Court either mandamus or grant certiorari to review such a holding? These questions need no answer.

It is respectfully submitted that the petition for mandamus should be denied.

CONCLUSION

When all of the rancor is removed from Deen's petition, it is obvious that the worst thing that could happen to him, even if he is right about everything,

is that the case will ultimately be remanded to the District Court of Brown County, Texas, for a new trial before a different jury. If that jury gives him twice as much damages as he received in the first trial, no federal right will have been infringed, Deen will have been denied no federal right and no provision of any constitution will be involved. If that trial results in a verdict for Deen for half what he received in the first trial, and if the Texas Supreme Court or Court of Civil Appeals has, in its opinions prior to the filing of this petition for mandamus, denied Deen any federal right, he can then appeal on the decisions now made. In short, Deen can win, but he cannot lose. Surely such a situation does not justify the issuance of any character of mandamus or certiorari.

Respectfully submitted,

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I certify that a copy of the foregoing respondent's reply to petition for mandamus has been mailed on the 1st day of July, 1958, to the petitioner's attorneys, as follows: to Mr. David C. McCord, 519 Mercantile Bank Building, Dallas 1, Texas; and to Messrs. Johnson, Guthrie & Stanfield, 1608 Mercantile Bank Building, Dallas 1, Texas.

Luther Hudson